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IN THE

Supreme Court of the United States

October Term, 1967

No. 795

ROBERT R. KAUFMAN,

Petitioner,

v.

THE ASSOCIATION OF THE
BAR OF THE CITY OF NEW YORK,

Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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TABLE OF CASES

	Page
Cohen v. Hurley, 366 U. S. 117	2
Greason v. Zuckerman, 28 A. D. 2d 907, 282, N. Y. S. 2d 951	2
In Re Ungar, 282 N.Y.S. 2d 158, cert. pending, No. 685, October Term, 1967	3
Johnson v. New Jersey, 384 U. S. 719	5
Kaye v. Coordinating Committee, 386 U. S. 17	2
Spevack v. Klein, 385 U. S. 511	1
Tehan v. Shott, 383 U. S. 15	5
Zuckerman v. Greason, 386 U. S. 15	2

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Respondent opposes the grant of *certiorari* on the grounds (1) that petitioner waived his constitutional claim, (2) that this Court's decision in *Spevack v. Klein,* 385 U.S. 511, should not be retroactively applied, and (3) that a disciplinary proceeding is not a criminal case within the meaning of the Fifth Amendment.

1. The petition points out (pp. 10-11) that petitioner invoked the privilege against self-incrimination promptly after the decisions of this Court in *Spevack v. Klein, supra, Kaye v. Coordinating Committee,* 386 U. S. 17, and *Zuckerman v. Greason,* 386 U. S. 15, had made clear that the privilege was available to attorneys in state disbarment proceedings. The Court had previously held in *Cohen v. Hurley,* 366 U. S. 117, that a state could disbar an attorney for invoking the privilege. Respondent's claim of waiver is based upon the argument that petitioner relies upon a number of cases decided long before *Spevack* which he could have relied upon in the course of the disciplinary proceeding and that *Spevack* does not justify a refusal to furnish information which might tend to subject an attorney to disciplinary action as distinguished from criminal prosecution.

The simple fact is that, regardless of whether *Spevack v. Klein* or other decisions cited are relevant to the substantive issue presented by the petition, petitioner would have been disbarred if he had invoked the privilege in the disciplinary proceeding before this Court overruled *Cohen v. Hurley* in *Spevack v. Klein.* This was recognized by the New York Court of Appeals in *Zuckerman v. Greason,* decided October 3, 1967 (not yet reported). Upon reconsideration after remand by this Court (386 U. S. 15) the Appellate Division, Second Department, in effect held that the failure of the petitioners to object in the disciplinary hearing to the reception of self-incriminating evidence precluded consideration of the merits of their constitutional claim. *Greason v. Zuckerman,* 28 A. D. 2d 907, 282 N.Y. S. 2d 951. The Court of Appeals, however, passed upon the merits of the constitutional claim, expressly recognizing that the attorneys' reliance on the privilege could have resulted in their disbarment:

> Appellants now contend that sustaining them [the charges] wholly or partly on the basis of data submitted by Zuckerman and Haber is unconstitutional under the holding of the Supreme Court in their case in light of *Spevack* and *Garrity*. *** If Zuckerman and Haber's constitutional contention be correct on this appeal, it might be argued with some force that neither of them was obliged to object in order to raise the point, in as much as making that objection could have resulted automatically in their disbarment for so long as *Cohen v. Hurley* remained the law.

Petitioner's failure to claim the privilege under the threat of disbarment for doing so cannot be construed as a waiver of the constitutional claim.

2. The argument against the retroactive application of *Spevack v. Klein* is wholly irrelevant since petitioner does not claim that *Spevack v. Klein* is controlling here. On the contrary, the petition acknowledges that "the decision cannot be considered a holding that the privilege is available with respect to the sanction of disbarment" (Petition, p. 8), and urges the Court to grant *certiorari* in order to decide "the heretofore unresolved question whether a disbarment proceeding is a 'criminal case' for purposes of the privilege against self-incrimination" (p. 13).

The importance of resolving this question, in view of its frequent recurrence in disciplinary proceedings in the State of New York, is emphasized not only by the decision of the court below in *In re Ungar*, 282 N.Y.S. 2d 158, *certiorari* pending, No. 685, October Term, 1967, but also by the subsequent decision of the New York Court of Appeals in *Zuckerman v. Greason, supra*, which held:

> The Fifth Amendment relates to self-incrimination on charges of crime. Disciplinary proceedings for professional misconduct are civil in nature *** The evidence which these appellants produced before the Referee cannot be used against them in any criminal proceeding. They had no privilege against making disclosure usable only in a disciplinary proceeding. The constitutional privilege applies only in the case of evidence which might be used against them in a criminal case under the language of the Fifth Amendment. Haber and Zuckerman may have thought that unless they produced this evidence that they would be disbarred under *Cohen v. Hurley*, but neither *Garrity* or *Spevack* confers upon them a constitutional privilege to withhold evidence which cannot lead to criminal prosecution and bears only upon their right to continue to practice law.

Respondent's concern that sustaining petitioner's claim would have a serious impact on disciplinary proceedings concluded before the overruling of *Cohen v. Hurley* is premature. More than ten months have passed since this Court's decision in *Spevack v. Klein*. Respondent nevertheless makes no showing that attorneys previously disbarred have sought reinstatement on the ground that they would have invoked the privilege against self-incrimination had the prevailing law made it available to them. This argues strongly against the likelihood of a flood of applications for reinstatement for this reason and suggests that applications for reinstatement filed more than ten months after the overruling of *Cohen v. Hurley* would be subject to denial

as untimely. In any event, the argument is premature because the merits of the constitutional claim have not yet been decided and its determination is important for guidance in the conduct of future disciplinary proceedings. Under the recent New York decisions the penalty of disbarment is not within the protection of the privilege and the inquisitorial procedure heretofore followed in diciplinary proceedings of obtaining inculpatory evidence from the attorneys involved can be continued by the grant of immunity from prosecution for statutory crimes. After the Court has decided whether disbarment is within the scope of the privilege, it will be appropriate to deal with the question of the retroactive application of its decision. See *Tehan v. Shott*, 383 U. S. 406 and *Johnson v. New Jersey*, 384 U. S. 719.

3. In arguing that a disciplinary proceeding should not be treated as a criminal case within the meaning of the Fifth Amendment respondent cites as a horrible example the hypothetical case of an attorney granted immunity to obtain his testimony in the prosecution of a public official for receiving a bribe from the attorney and being permitted to continue as a member of the Bar if the privilege is held to extend to disbarment. Respondent urges that the privilege against self-incrimination should be denied to an attorney so that his testimony may be employed to convict another. It is difficult to conceive of a situation in which the only source of evidence is an attorney involved in corrupting the official. But even if this were so, respondent does not explain why the corrupted official's testimony would not be available in disciplinary proceedings after the trial of the public official has been concluded.

The complaint is frequently heard that persons guilty of heinous crimes will be permitted to go free if constitutional safeguards are held applicable. Undoubtedly, the task of prosecuting officials frequently would be simplified by eliminating the restraining effect of the constitutional guarantees.

But the scope of the great constitutional protections of the Bill of Rights has never been trimmed because prosecutions will thereby be rendered simpler or more efficient.

Respectfully submitted,

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